No. 6456.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
TSUGIO MIYAZONO
On Habeas Corpus.

Tsugio Miyazono,
Appellant,

vs.

Walter E. Carr, District Director, United States Immigration Service at Los Angeles, California,
Appellee.

BRIEF FOR APPELLEE.

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U. S. Immigration Service on the Brief.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order discharging a writ of habeas corpus and remanding Tsugio Miyazono to the custody of the United States Immigration Service for deportation to Japan.

The original Bureau of Immigration record in this case No. 55733/555 has been filed with the clerk of this court pursuant to order of the District Court [Transcript of

Record, p. 20]. Throughout this brief, said record will be referred to as the "Immigration File." The printed transcript of the proceedings in the District Court will be referred to as "Transcript of Record."

STATEMENT OF THE FACTS.

Tsugio Miyazono, appellant herein, was born in Japan on April 3, 1916, and is a citizen of Japan and of the Japanese race. He resided in Japan from the time of his birth until June 6, 1930, when he sailed from Yokohama, Japan, for San Pedro, California. He was manifested on the ship as a citizen of the United States and upon his arrival sought entry as such citizen. Appellant was accompanied on the same ship by his brother Hideo Miyazono and by his father Shichitaro Miyazono. Shichitaro Miyazono, appellant's father, presented a re-entry permit showing him to be an alien lawfully domiciled in this country who was returning from a temporary visit abroad and on the strength of this re-entry permit, Shichitaro Miyazono was landed on June 23, 1930, the day of his arrival. Hideo Miyazono, appellant's brother, was landed on July 16, 1930, as a native born citizen of the United States. The evidence adduced at the hearing before the Board of Special Inquiry at San Pedro established clearly that the appellant, Tsugio Miyazono, was not a citizen of the United States and on July 16, 1930, appellant was denied admission on the grounds that he

> "is an alien immigrant not in possession of an unexpired immigration visa, is of a race ineligible to citizenship, and not exempted from the operation of the Immigration Act of 1924 by section 13 (c) thereof." [See page 11, Record of Board Hearing appearing in Immigration File.]

Thereafter, an appeal was taken to the Department of Labor from the excluding decision and on the fifth day of August, 1930, the Department of Labor in Washington sustained the excluding decision of the Board of Special Inquiry at San Pedro. Appellee was preparing to return the appellant to Japan when this habeas corpus proceeding was instituted. After due hearing, the District Court discharged the writ and remanded appellant to custody of appellee. [See Memorandum Opinion and Order, page 12, Transcript of Record.] From the order and judgment of the District Court, this appeal has been taken.

QUESTION AT ISSUE.

While it was alleged in the complaint and petition for writ of habeas corpus, that appellant herein was a United States citizen unlawfully restrained of his liberty [Transcript of Record, pp. 3 and 4] and while it was contended by counsel in his brief in the court below that appellant herein was an American citizen, nevertheless in this appeal, counsel has abandoned the citizenship theory and now relies upon one specification of error as set forth on page 5 of his brief and reading as follows: "The court erred in holding and deciding that Tsugio Miyazono was not entitled to enter the United States as the son of a resident alien," and in this brief we will discuss this point.

ARGUMENT.

It is the contention of appellee that the facts in this case justified the Board of Special Inquiry in entering its excluding decision. Two grounds for exclusion are incorporated in the excluding decision. We will discuss them in the order in which they appear.

First Ground.

Tsugio Miyazono "is an alien immigrant not in possession of an unexpired immigration vise."

Tsugio Miyazono was born in Japan. At the time of his birth, Tsugio Miyazono's father was and is still a citizen of Japan. It follows, therefore, that Tsugio Miyazono is an alien as far as United States immigration laws are concerned. Section 3, Immigration Act 1924, Section 203, Title 8, U. S. C., provides that an alien departing from any place outside the United States destined to the United States is to be considered as an "immigrant" unless such alien falls within certain exceptions specified in the section. Appellant does not fall within these exceptions. Therefore the finding of the board that appellant is an "alien immigrant" was correct. It is not contended that appellant was in possession of an unexpired immigration vise at the time of his arrival at San Pedro. In fact, on page 5 of the board hearing at San Pedro (see immigration file), appellant's father testified no effort was made to secure a vise before leaving Japan. The first ground for exclusion has been sustained.

Second Ground.

Tsugio Miyazono "is of a race ineligible to citizenship, and not exempted from the operation of the Immigration Act of 1924 or section 13 (c) thereof."

Being of the Japanese race, Tsugio Miyazono is ineligible to citizenship (*Takeo Ozawa v. United States*, 260 U. S. 178). As provided for in section 13 (c), Immigration Act 1924 (Section 213, Tit. 8, U. S. C.), no alien

ineligible to citizenship shall be admitted to the United States unless such alien comes within the exceptions enumerated in that section. Tsugio Miyazono, the appellant, does not fall within those exceptions and the board at San Pedro was justified in relying upon this second ground for exclusion.

Appellee believes that both of the above grounds for exclusion have been amply sustained and that the Secretary of Labor properly affirmed the decision of the Board of Special Inquiry at San Pedro.

REPLY TO APPELLANT'S BRIEF.

Counsel advances two reasons why this appeal should be sustained and why the appellant should be released from custody. We will discuss these reasons in the order below stated.

First Reason.

Counsel contends that the hearing before the Board of Special Inquiry at San Pedro was unfair because decided solely upon the question of appellant's citizenship and that appellant was not given opportunity to be heard upon the question of his admissibility as the son of a resident alien.

The birth certificate appellant presented was issued in Monterey, California, August 2, 1916, indicating that as far back as that date plans had been formulated to bring appellant to the United States some day as a citizen of this country. At the time of his arrival, he appeared on the ship's manifest as a United States citizen, the

manifest information having been furnished by appellant's father. (See page 5, board hearing in immigration file.) Appellant sought entry as a citizen. Although appellant's father did not testify before the board at San Pedro that appellant was born in the United States, yet appellant's brother Hideo, testified (page 9 of the Board of Special Inquiry appearing in the immigration file) that appellant was born in the United States, and on pages 9 and 10 in the same record, appellant also testified as to his birth here. There seems to be no intention on the part of appellant to seek entry under any status other than that of a citizen of the United States. With his citizenship claims swept away, he could not have been admitted as the son of a resident alien or under any other status, even though he had claimed that right, for he possessed no immigration vise at the time of his arrival, and furthermore, he is ineligible to citizenship and his case does not come within the exceptions specified by section 13 (c) of the Immigration Act of 1924 (Section 213, Tit. 8, U. S. C.).

Having elected to apply for admission as a citizen of the United States, appellee contends that there was no unfairness on the part of the board in deciding the case upon the citizenship claim.

Second Reason.

Counsel contends that appellant was not required to have an unexpired immigration vise at the time of his entry.

Appellant applied for permanent admission to the United States. (See testimony, page 1 of the board hear-

ing in the immigration file.) Because permanent admission was sought, appellant was an "immigrant" alien under section 3, Immigration Act of 1924 (Section 203, Tit. 8, U. S. C.), as distinguished from a "non immigrant" whose admission is for temporary purposes only. Section 13 (a) of the Immigration Act of 1924 (Section 213, Tit. 8, U. S. C.) provides in part as follows:

> "No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration vise or was born subsequent to the issuance of the immigration vise of the accompanying parent. * * *."

It follows, therefore, that being an "immigrant," appellant required a vise unless he was "born subsequent to the issuance of the immigration vise of the accompanying parent." Shichitaro Miyazono, the accompanying parent, returned to Japan in 1929 on a temporary visit. Prior to his departure from the United States he secured a re-entry permit as provided for in section 10, Immigration Act of 1924 (Section 210, Tit. 8, U. S. C.), and was admitted upon this re-entry permit when he returned to the United States. He did not possess an immigration vise. We cannot accord appellant "the same status as one born subsequent to the issuance of the immigration vise to accompanying parent," as contended for by counsel on page 8 of his brief. Appellant was not born subsequent to the issuance of the document of his accompanying parent, but was born on April 3, 1916. If the accompanying parent had departed from the United States in 1929 without a return permit, it would have been necessary for him to have secured a nonquota immigration vise from the American consul in Japan before he could have been readmitted to the United States (Section 4 (b),

Immigration Act 1924, Section 204, Tit. 8, U. S. C.). But such vise, if it had been issued to the accompanying parent, would have availed the appellant nothing, for he was born at least twelve years prior to any date upon which such immigration vise might have been issued to the accompanying parent after the latter's arrival in Japan in 1929. Manifestly a child of an accompanying parent who holds a re-entry permit can be accorded no greater privilege than is the child of the holder of the immigration vise. It seems clear, therefore, that having been born some twelve years prior to the issuance of the re-entry permit to the accompanying parent, appellant was not exempted from the law requiring him as an alien applicant to present an unexpired immigration vise.

Appellee respectfully contends, therefore, that appellant's second reason why the appeal should be sustained is untenable.

On page 9 of his brief, counsel complains that the Board of Special Inquiry did not go into the question as to whether appellant's father, Shichitaro Miyazono was entitled to a mercantile status. Then follows the citation of a number of cases dealing with the admissibility of the wives and minor children of Chinese merchants. Shichitaro Miyazono is not now and apparently never has been a merchant. On page 4 of the board hearing as it appears in the "immigration file," Shichitaro Miyazono testified that since 1920 "I have been working in the beet fields at Soledad." None of the Chinese cases cited have any bearing here and no discussion of those cases is necessary. Nor has the case of *U. S. ex rel. Burman v. Curran*, 13 Fed. (2d) 96, cited on page 10 of his brief, any

bearing upon the case at bar. *Whitefield v. Hanges,* 222 Fed. 745, on page 12 of his brief, and the *Japanese Immigration Case,* 189 U. S. 86, hold that an alien should be given opportunity to be heard as to his right to be and remain in the United States, and when an alien is unlawfully deprived of his liberty without full and fair hearing the courts of the United States may release him under habeas corpus proceedings. We have no dispute with these well-known principles of law. It is appellee's contention that there is nothing in the record of the Board of Special Inquiry in this case to indicate that the board abused its discretion (*U. S. v. Ju Toy,* 198 U. S. 253); or that the hearing was unfair (*Zakonaite v. Wolf,* 226 U. S. 272); or that there was an application of an erroneous rule of law (*Ng Fung Ho. v. White,* 259 U. S. 276). This being true, it is appellee's contention that the decision of the Board of Special Inquiry was final.

CONCLUSION.

For the reasons above set forth, appellee believes that appellant was properly excluded by the Board of Special Inquiry at San Pedro, California.

Respectfully submitted,

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